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(20,196)

NO. 253

(OCTOBER TERM, 1908)

IN THE

Supreme Court of the United States

R. G. STONE, R. M. FINLEY AND NANNIE E. FINLEY,

Plaintiffs in Error.

vs.

SOUTHERN ILLINOIS AND MISSOURI BRIDGE COMPANY,

Defendant in Error,

In Error to the Supreme Court of the State of Missouri

BRIEF FOR PLAINTIFFS IN ERROR

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Due service of BRIEF FOR PLAINTIFFS IN ERROR acknowledged.

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STATEMENT FOR PLAINTIFFS IN ERROR

Short Outline. The writ of error in this case is brought to review a final judgment of the Supreme Court of Missouri in a suit begun in the Circuit Court of that State by defendant in error (plaintiff below) against the plaintiffs in error (defendants below) to

condemn about 20 acres of land (comprising a strip 200 feet wide, and over 4,000 feet long) as part of an approach to a RAILROAD BRIDGE over the Mississippi River, constructed by defendant in error, a bridge company, incorporated in Illinois under the general laws of that State, which do not confer on such corporations the right of eminent domain.

The bridge was authorized by an Act of Congress which requires the Bridge Company to submit first to the Secretary of War its **"design and drawings of the bridge, piers, approaches and accessory works"**, which (after reference to the U. S. Board of Engineers) when approved by the Secretary, should form the plans for the construction of the bridge.

The Bridge Company accordingly submitted its designs and drawing of the bridge approaches. They were approved by the Secretary of War. Those documents **defined the limits of the bridge approach,** on the Missouri side, at 720 feet from the river bank, as is shown by the plat in the Printed Record (p. 68). Nevertheless, the strip of land proposed to be taken and condemned for bridge purposes, under the rulings in the decision of a majority of the Supreme Court of Missouri, extends westward from the river bank **about twelve thousand feet.**

Two decisions by a majority of the Supreme Court of Missouri have been rendered, which state some features of the litigation. The later judgment is the one to which the pending writ of error is directed.

So. Ill. and Mo. Bridge Co. v. Stone, 174 Mo. 1; 194 Mo. 175

It should be noted, at the outset, that the Missouri statute in regard to the condemnation of land for bridge

approaches does not purport to apply to bridges across interstate streams such as the Mississippi.

The Bridge Company was not incorporated under the laws of Missouri.

The laws of Illinois, under which the Bridge Company was organized, do not authorize the condemnation of land by such companies for bridge purposes.

These facts all appear affirmatively in this Record.

It is the contention of plaintiffs in error that the right to condemn their land as an approach to this bridge, whose rightful construction depends upon the authority conferred by an Act of Congress, is limited by the constitution and laws of the United States to an **area defined by those Federal laws**, and that plaintiffs in error enjoy, by virtue of those laws, an immunity from having their land taken **for the purpose of a bridge approach** beyond the territorial limits marked for that approach by the PLANS, DESIGNS and DRAWINGS of the Bridge Company, approved by the Secretary of War, under the Federal law which formed the only authority making the bridge a **"lawful structure"** (to quote the language of the Act of Congress itself).

Plaintiffs in error have observed, as will appear later, all the formalities necessary to bring under review by this Court the questions which will be discussed in this brief.

Many matters of detail will be necessary to consider in reaching a full understanding of the case.

This outline is intended merely to afford a broad view of the general features of the controversy.

ABSTRACT OF THE RECORD.

The suit was commenced by the filing of a petition in the Circuit Court of Scott County, Missouri, April 24, 1902, and on the same day a writ of summons was issued to defendants (Printed Record, p. 5).

The proceedings are founded on said petition, which is as follows (omitting caption):

PETITION.

Plaintiff for its cause of action says it is a corporation regularly incorporated **under the laws of the State of Illinois** and has obtained from the Secretary of State of the State of Missouri authority to do business in the State of Missouri.

That it is incorporated for the purpose of erecting and maintaining a **bridge** across the Mississippi River from a point near Thebes, in Alexander County Illinois, to a point near Manning's Landing, in Scott County, Missouri, with the necessary appurtenances thereto.

That said bridge is being constructed **under an act of Congress** entitled an Act to Authorize the Construction of a Bridge across the Mississippi River at or near Grays Point, Missouri, approved January 26th, 1901. That the same is being constructed **within the territorial limits and conditions in said act fully set out.**

That said bridge is intended as a railway bridge and it is necessary for this plaintiff to have a right-of-way **for its railway tracks, bridge and terminal yards,** etc.

That the general direction of its **yards** will be westwardly from the western bank of the Mississippi River.

That **for the purpose of carrying out its charter privileges,** it is necessary for it to hold and to own the following described tract of land, lying and being in the County of Scott, State of Missouri, to-wit:

> A part of the S. E. and S. W. parts of private survey No. 794 in tw. 30, range 14 East, and in lot 2 of the N. E. qr. of sec. 2, tw. 29, range 14 East, being a ract of land 200 ft. wide, 100 ft. on each side of the center line of the approaches to the Southern Illinois and Missouri Bridge Co., as located and platted, beginning at a point on the East line of fractional sec. 34, tw. 30, R. 14 East, and 1240 ft. from the S. E. cor. of said frac. sec., thence run South 70 degree 45 minutes East 765 ft., thence by a one degree curve to the right 980 4-10 ft., thence south 59 degree 45 minutes East 924 8-10 ft., thence by a 2 deg. 30 min. curve to left 1289 3-10 ft., thence N. 87 deg. 51 min. East to the west bank of the Mississippi River; said center line intersects the north line of twp. 29, 100½ ft. west of the N. W. cor. of lot 2 in the N. E. qr. of sec. 2, twp. 29, R. 14 East, and also intersects the west line of said lot 2, 69 1-10 ft. south of the N. W. cor. of said lot 2.

The tract above described contains 20 3-10 acres and will appear **by a blue print hereto attached** and made a part of this petition.

That the defendants herein, together with R. M. Finley, the husband of one of the defendants, are the owners of said real estate.

That defendants Heldt, Miller and Bates are tenants, having growing crops on different portions of said real estate.

That the defendants have refused to relinquish the plaintiff the right to the occupancy and use of said real estate for the purposes designated.

That your petitioner has endeavored to agree with defendants and each of them, upon the price to pay for said property, but has been unable to amicably settle or to agree at all upon a proper compensation to either of the parties defendant.

That said real estate **is necessary for the laying of tracks and the handling of business over and across plaintiff's bridge.**

Wherefore your petitioner prays the Court to make such orders and decrees that may be proper and necessary and to appoint three freeholders of the County of Scott and State of Missouri, as commissioners **to assess the damages** which defendants may sustain in consequence of the establishment, erection and maintenance of said road and approaches over and through the said premises and for all proper orders.

W. H. MILLER,
For Plaintiff.

At the return day, a change of venue was granted and the cause transferred to the Dunklin Circuit Court, where defendants filed their

ANSWER,

not needful to quote at this time since it was amended later.

On the issues thus raised, a hearing took place in 1902, and the Circuit Court gave

JUDGMENT FOR DEFENDANTS

Plaintiff appealed to the Supreme Court where a majority of the judges reversed the judgment (174 Mo. 1) and remanded the case with directions

"To The Circuit Court

of Dunklin County to proceed at once to appoint three disinterested commissioners", etc., as prayed, "to assess damages", etc.

Thereafter, March 24, 1903, the Circuit Judge appointed three commissioners, who after a hearing made report, assessing the damages to defendants at $8,120 (Printed Record, p. 21).

Exceptions of Defendants

Defendants filed exceptions to the report of the commissioners, challenging its validity and sufficiency in many particulars, fully shown in the Printed Record (p. 12). These exceptions in paragraphs "*First, Second, Third, Sixth, Seventh, Eighth* and *Tenth*", raise several of the Federal questions to be presented here.

Cause Set for Hearing

After the exceptions were filed, the cause was set for hearing and the defendants filed (Printed Record, p. 18) their

Amended Answer (omitting caption)

Some parts of the answer relate to matters not reviewable here, but the following passages indicate objections made at the out set by defendants (now plaintiffs in error):

* * * * * *

"And defendants further aver, on the other hand, that plaintiff has *no power to condemn the property described in its said petition beyond the seven hundred and twenty (720) feet*, the length of the approach to said bridge on the Missouri side of said Mississippi River, for the reason that by the terms of said Act of Congress, approved as aforesaid, on

January 26, 1901, the approaches to said bridge as to length, height, breadth and general character were placed *under the supervision of, and to be determined by the Secretary of War*, or the Civil Engineers of his department, and that, by said Act of Congress, that power was vested *alone* in him.

Defendants aver that the said Secretary of War has discharged his duty in that behalf *by so fixing the height, breadth, length and general character of said approaches*, and that he has in the manner provided for by said Act of Congress *established the length of the approach, on the Missouri side of said river*, at *seven hundred and twenty (720) feet as above stated*, as evidenced by the Secretary of War's certificate hereto attached and made a part of this answer, and not at forty-five hundred (4,500) feet, or any other distance, as claimed by plaintiff company.

Defendants state that plaintiff is, by the terms of its charter, and said Acts of Congress, and cognate Acts of Congress, and the fixing of said western approach to said bridge at seven hundred and twenty (720) feet by the Secretary of War as aforesaid, *confined unalterably to that approach, and to the length of seven hundred and twenty (720) feet as aforesaid*, and not to any other length, *and that as a matter of law, the Court should declare the length of said approach to be* seven hundred and twenty (720) feet, and nothing over that length or distance.

However, if the Court, in its judgment, should not consider the *length of said approach a question of law*, then, as a matter of right and by proper procedure, that question should be submitted by the Court as one of fact, under proper instructions, to the jury, *and on this point the defendants pray the judgment of the Court.*

* * * * * *

Defendants state that the taking of property *by such void orders and judgment is in violation of that fundamental principle of constitutional law, Federal and State, that declares that "no person*

shall be deprived of life, *liberty or property without* due process of law, nor deny any person within its jurisdiction the equal protection of the law", and on these constitutional provisions, defendants rely for the protection of their rights in the premises, and now and here plead them against plaintiff's usurpation of charter powers and pretended lawful claim to condemn their land; and aver that it has no right and no authority whatever to take that strip of their land, two hundred (200) feet wide, for a distance of approximately four thousand (4,000) feet, west of and beyond the established approach to said bridge of the said seven hundred and twenty (720) feet, as fully hereinbefore described.

SAID ANSWER was verified by one of the attorneys on behalf of and for defendants.

TRIAL

The cause then came to trial in the Circuit Court before a jury.

The following facts appeared by undisputed evidence, chiefly documentary, which are duly preserved by bill of exceptions in accord with the practice in Missouri (Printed Record, pp. 22-182).

Plaintiff is a corporation organized under the **laws of Illinois,** by Articles of Incorporation offered in evidence which recite the name of the company; that it is formed under the "Act Concerning Corporations", approved April 18. 1872; has capital stock of $50,000, in 500 shares of 100 dollars each; and has its principal office in Chicago, Illinois, and corporate term of 99 years. (Record p. 89.)

The objects for which said corporation is formed are described (in the Articles) as follows:

"The objects for which said corporation is formed is **to erect, construct, maintain and operate a bridge and approaches thereto over the Mississippi River from a point on** the east bank of **the Mississippi River in** the **County** of **Alexander in** the **State of Illinois to** a point opposite thereto **in** the **State of Missouri,** which said bridge and approaches thereto shall **provide for the passage of railway trains and, at the option of said corporation, its successors and assigns, may be so constructed as to provide for and be used also for the passage of wagons and vehicles of all kinds, for the transit of animals and for foot-passengers, for such reasonable tolls as may be approved from time to time by the Secretary of War.**"

[The significance of the foregoing can best be understood by comparing it with the first section of the Act of Congress under which the bridge construction was authorized upon certain conditions. Those parts of the above passage marked in **bold faced type**, showing the objects of the Bridge Company, according to its own expression thereof, will be found identical with the terms of the first section of the Act of Congress concerning this Bridge.]

It should also be noted that the Articles of Incorporation of plaintiff were acknowledged, Dec. 5, 1900. The certificate of the Secretary of State of Illinois pronouncing its full legal organization is dated Dec. 28, 1900, while the Act of Congress was "approved January 26, 1901", and recites the incorporation of plaintiff (Printed Record, p. 84).

It is upon this Act of Congress *only* that plaintiff's right to construct the bridge can be sustained. Necessarily, the conditions of that Act are essential and jurisdictional requirements to the exercise of any rights

to erect or maintain the bridge or its approaches under the present Federal law (30 U. S. Stat. L., p. 1151, sec. 9.)

Plaintiff, March 25, 1902, obtained from the Secretary of State of Missouri, a certificate of compliance with the law governing Foreign Private Corporations and a license to do business in this State. (Printed Record, p. 93.)

The Illinois statute referred to in the Articles of Incorporation was put in evidence by defendants as follows:

> Chapter 32, section 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, that corporations may be formed in the manner provided in this act for any lawful purpose except banking, insurance, real estate, brokerage, the operation of railroads and the business of loaning money, provided that horse and dummy railroads and organizations for the purchase and sale of real estate for burial purposes only, may be organized and conducted under the provisions of this act, and provided further that corporations formed for the purpose of constructing railroad bridges shall not be held to be railroad corporations.
>
> (Printed Record, p. 83.)

The Federal Act of Congress, approved January 26, 1901, was put in evidence (Printed Record, p. 84).

All of its terms are important, but for this statement only certain parts will be reprinted:

ACT OF CONGRESS

An Act to authorize the construction of a bridge across the Mississippi River at or near Gray's Point, Missouri.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Southern Illinois & Missouri Bridge Company, **a corporation created and organized under and by virtue of the laws of the State of Illinois,** its successors and assigns, be, and the same are hereby, authorized and empowered to **erect, construct, maintain, and operate a bridge and approaches thereto over the Mississippi River** from a point on the Mississippi River in Alexander County, in the State of Illinois, opposite the terminus of the Saint Louis Southwestern Railway, at or near Gray's Point, in Scott County, in the State of Missouri, or from some other convenient point on said river in said Alexander County, Illinois, to some opposite point on said river in the State of Missouri, within the distance of three miles above or below the terminus of said railway. **Said bridge shall be constructed to provide for the passage of railway trains,** and, at the option of said corporation, its successors or assigns, may be so constructed as to provide for and be used also for the passage of wagons and vehicles of all kinds, for the transit of animals, and for foot passengers for such reasonable tolls as may be approved from time to time by the Secretary of War.

Sec. 2. That the bridge **BUILT,** operated, and maintained **under this Act, and subject to its limi-**

tations, shall be a **lawful structure** and shall be recognized and known as a post route, upon which also no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for the transportation of the same over the railroads or public highways leading to said bridge, and it shall enjoy the rights and privileges of other post roads in the United States; and equal privileges in the use of said bridge shall be granted to all telegraph and telephone companies; and the United States shall have the right-of-way across said bridge and its approaches for postal-telegraph or for telephone purposes.

Sec. 3. [Contains directions in regard to spans, clear headroom, etc.]

Sec. 4. That all piers shall be built parallel to the current of the river at the stage of water that is most important to navigation.

[Here follow other terms in regard to construction.]

Sec. 5. **That the approaches to the bridge built under this Act shall be so designed and constructed** as not to interfere with the free discharge of the river in seasons of flood; and any encroachment on the high-water cross-sections by piers, solid embankments, or otherwise, which might result in unduly accelerating the high-water current at the site of the bridge shall not be allowed.

[Then follow provisions for protection of river craft.]

Sec. 6. [Contains more provisions for protection of navigation.]

Sec. 7. That the said company shall submit in triplicate to the Secretary of War, for his examination, upon a convenient scale, **a design and drawings of the bridge, piers, approaches and accessory works, and a map of the location,** giving, for the space of at least two miles above and one below the proposed site, the topography of the banks of the river and the shore lines at high and low water, and this map shall be accompanied **by another drawn on a scale of one inch to two hundred feet,** giving for a space of one-half mile above the proposed site and a quarter of a mile below, an accurate representation of the bottom of the river by contour lines two feet apart determined by accurate soundings, and also showing over the whole width of this part of the river the force and direction of the currents at low water, at high water, and at least one intermediate stage, by triangulated observations on suitable floats; and these maps shall also show the location of other bridges, coal tipples, cribs, and all other structures projecting into the river at bank-full stage, in the vicinity, and shall give such other information as the Secretary of War may require for a full and satisfactory understanding of the subject. Said maps and drawings shall be referred to the board of officers of the Corps of Engineers, United States Army, for examination and report, which board shall personally examine the site of the proposed bridge and shall hold a public session in the City

of St. Louis, Missouri, **to hear all objections thereto,** of which public session due notice and invitation to be present shall be given to all interested parties by advertising, and such parties shall be allowed sufficient time for a full examination and consideration of the plans; and if said board of engineers reports that the location selected is unsuitabte for a bridge, **the bridge shall not be built at that location,** or if said board reports that the plans presented are unfavorable to the interests of navigation at the site proposed the Secretary of War shall be authorized, on recommendation of said board, to refuse permission for the construction of a bridge at the proposed site until such changes in the design of the bridge or the location of its piers as may be deemed necessary shall have been made, and to require, in the same way, at the expense of the parties constructing such bridge, the construction of such dikes and other auxiliary structure as may be needed for confining the flow to a permanent channel for a distance of not less than one mile above the bridge site for a proper distance below, but in no case shall there be a reduction in the width or headroom of channel or other spans, or in the arrangement and length of accessory works required by this Act, unless such reduction is made necessary by the physical characteristics of the river in the locality where the bridge is proposed, or is shown clearly to be not injurious to the interests of navigation; and the **proposed bridge shall be a lawful structure only when built in accordance with the plans as recommended by the said board of engineers,** and ap-

proved by the Chief of Engineers, United States Army, **and the Secretary of War,** and while so managed and kept in repair as to offer at all times reasonable and proper means for the passage of rafts, steamboats, and other water craft under said bridge, and while all the requirements of this Act are observed.

Sec. 8. [Relates to lights and signals and water-gauges.]

Sec. 9. That all railroad companies desiring the use of any bridge constructed under this Act shall have, and be entitled to, equal rights and privileges relative to the passage of railway trains or cars over the same and over the approaches thereto, upon payment of a reasonable compensation for such use; and in case the parties interested shall fail to agree upon the sum or sums to be paid and upon the rules and conditions to which each shall conform in using said bridge, all matters at issue between them shall, upon the application of either party, be determined by the Circuit Court of the United States in and for any district in which any portion of said bridge may be.

Sec. 10. That such **alterations and changes** as may be required by the Secretary of War, in accordance with existing law, **in the bridge constructed under the provisions of this Act,** so as to preserve free and convenient navigation, shall be made under the direction of the Secretary of War at the expense of the persons, companies, or corporations owning, controlling, or operating said

bridge; and the fact that said bridge was constructed under the supervision of the United States shall not be held to be a bar to the enforcement of this requirement.

Sec. 11. That the **bridge constructed** under the authority of this Act shall be **built under the general supervision of the Secretary of War,** and **no changes or alterations in plans shall be made during construction of said bridge or after its completion** unless said changes or alterations conform to the provisions of this Act and are recommended by the Chief of Engineers and **approved by the Secretary of War.** That during the original construction of said bridge, or in carrying out any authorized changes or repairs of said bridge, a navigable channel sufficient to accommodate the commerce of the river shall be preserved at all times at the site thereof, and the waterway of the river shall not be obstructed to a greater extent than is absolutely necessary, and such lights and buoys shall be kept on all cofferdams, piles, and other structures as may be necessary for the security of navigation; * * *

Sec. 12. That the right to alter, amend, or repeal this Act is hereby expressly reserved, and the right to require, at the expense of the owners, the **entire removal of any bridge** constructed under the provisions of this Act whenever Congress shall decide that the public interest so require is also expressly reserved; and the United States shall not be liable for damages arising from the exercise of the rights thus expressly reserved.

Sec. 13. That if the **construction of the bridge hereby authorized** shall not be commenced within one year and be **completed within three years** from the date of approval of this Act, then this Act shall be null and void, and all rights hereby conferred shall cease and determine.

Approved, January 26, 1901.

31 U. S. Stat. L. 741

The Act appears to have been introduced December 10, 1900, in the House of Representatives (No. 12,548) as appears by the Congressional Record of the 2nd session of the 56th Congress. It was passed by the House, January 18, 1901, and by the Senate, January 21, 1901, as appears by the same official record. It was approved by the President, January 26, 1901, and then became a law. (See said Congressional Record, pp. 208, 1239, 1251.)

Under this Act (sec. 7) the plaintiff submitted a **drawing and plan of the bridge approach on the western (or Missouri) side of the river.** It was put in evidence by defendants and appears at page 68 of the Printed Record. The certificate of the Chief of Engineers of the U. S. Army and of the Secretary of War, Hon. ELIHU ROOT, are extremely clear and definite as to the purpose, intent and scope of the map, as follows:

United States of America,
War Department,
WASHINGTON, April 23, 1903.

I hereby certify that the attached writing is a copy of the instrument executed by the Secretary of War, January 16, 1902, approving the plan and location of the bridge proposed to be built across

the Mississippi River, at or near Grays Point Mo., by the Southern Illinois and Missouri Bridge Company; that the attached tracing is a part of the plan, approved as aforesaid, showing piers 5 and 6 and the **western approach of the proposed bridge;** and that the same are true and correct copies of the originals on file in the office of the Chief of Engineers, U. S. Army.

G. L. GILLESPIE,
Brig. Gen., Chief of Engineers,
U. S. Army.

Be it known that G. L. Gillespie, who signed the foregoing certificate, is the Chief of Engineers of the United States Army, and that to his attestation as such full faith and credit are and ought to be given.

SEAL
UNITED STATES
OF AMERICA
WAR OFFICE

In witness whereof, I have hereunto set my hand and caused the seal of the War Department to be affixed, on this twenty-fourth day of April, one thousand nine hundred and three.

ELIHU ROOT,
Secretary of War.

Whereas, By an Act of Congress, approved January 26, 1901, entitled "An Act to authorize the construction of a bridge across the Mississippi River at or near Grays Point, Missouri",..... ..... the Southern Illinois and Missouri Bridge Company, a corporation existing under the laws of the State of Illinois,..... ..... was authorized to construct a bridge over the Mississippi River at or near Grays Point, Missouri, ...upon obtaining the approval by the Secretary of War of such design and drawings and map of location of the said bridge as shall comply with the requirements of the said act;

And whereas, said Southern Illinois and Mis-

souri Bridge Company has submitted to the Secretary of War, for his examination and approval, a design and drawings and a map of the location of a proposed bridge over said river at said place, which comply with the requirements of said act;

Now, therefore, This is to certify that the said design and drawings and map of location, which are hereto attached, are hereby approved by the Secretary of War, subject to the following condition:

That the Engineer Officer of the United States Army, in charge of the district within which the bridge is to be built, may supervise its construction, in order that said plans shall be complied with.

WITNESS my hand this sixteenth day of January, 1902.

[SEAL] WM. CARY SANGER,
Asst. Secretary of War.

It was shown by the evidence of the Chief Engineer of the Bridge Company that the work of construction did not begin "until along in April", 1902 (Evidence of Mr. Angier, Printed Record, p. 23).

It was further shown that plaintiff had been enjoined from entering upon the real estate in controversy (or from interfering with its possession) in a suit brought by the Cape Girardeau & Thebes Terminal Railroad Company (a Missouri corporation) against the Southern Illinois & Missouri Bridge Co. (Printed Record, p. 107). The Terminal Railroad Co. had acquired title under defendants, who had parted with their title by deed recorded April 24, 1902, same day (but a little later in time than the hour when the present plaintiff's suit was filed) and under a contract or option for sale made early in April, 1902 (Printed Record, pp. 104–5).

The injunction was issued on the proper showing and contains a full recital of the facts on which it is

founded. It was in force at the time of the trial, and its mandatory language forbids any further proceedings in the case at bar (Printed Record, p. 109).

There was much evidence on the issue of values which need not be repeated at this time.

The details of the testimony at the trial are unnecessary here. So far as any of them are material, they will be mentioned in connection with the discussion concerning them.

Plaintiff's Instructions Given

At the close of the evidence the Court gave to the jury instructions on behalf of the plaintiff, to each of which the defendants excepted at the time. Those which bear upon the matters reviewable in this Court are as follows:

No. 1

"The Court instructs the jury that on the 24th day of April, 1902, at 10:40 o'clock a. m., the Southern Illinois and Missouri Bridge Company as plaintiff, filed in the Circuit Court of Scott County, Missouri, its petition against R. G. Stone, Nannie Finley and R. M. Finley, her husband, as owners, and Birgehardt Miller, Perry Bates and David Heldt, as occupying tenants, seeking to condemn for public use in connection with its bridge a strip of ground 200 feet wide and about 4,500 feet long, then owned by the said R. G. Stone, Nannie E. Finley and R. M. Finley, her husband, more particularly described as follows:"

[Then follows description of land as in petition.]

No. 2

The Court further instructs you that the plaintiff Bridge Company has the right under the law to take and appropriate said strip of ground upon pay-

ing to said defendant owners R. G. Stone, Nannie E. Finley and R. M. Finley, her husband, just compensation therefor, and that the only matter for the jury to determine in this cause is the just compensation to be paid by said company to said defendants.

No. 3

This just compensation, or in other words, the damages to which defendants are entitled, is the difference in the fair market value of defendants' whole property before and after the appropriation by plaintiff of the strip of land above described in view of the uses to which said strip condemned was to be thereafter applied.

The instruction No. 4 for plaintiff declares that

"The market value of the property means its actual value, independent of the location of plaintiff's bridge and approaches thereon; that is, the fair value of the property as between one who wants to purchase and one who wants to sell it", etc.

The fifth instruction for plaintiff bears on assessment of damages as to value only. (Printed Record, p. 176.)

The next instruction for plaintiff is as follows:

No. 6

The jury will consider the **benefits,** if any, and the disadvantages, if any, **resulting to the remainder of defendants' said property** from the appropriation by plaintiff Bridge Company, of the strip of land in question for the purpose of its bridge and approaches. The benefits to be considered and allowed by the jury are the direct and peculiar benefits, if any, which result **to the remainder of defendants' said property** and not the general benefits which defendants derive in common with the other land owners in the vicinity from the building of the bridge and its approaches.

Defendants' Instructions

The defendants' instructions given do not cure any of the points to be urged against those given for plaintiff, and relate only to values (Printed Record, p. 173).

Refused Instructions Asked by Defendants

One of the requests for instructions, refused by the trial court, should be noted, as follows:

4.

> The Court instructs the jury that plaintiff, under its charter and the Act of Congress authorizing it to build the bridge and approaches thereto, in view of the testimony submitted in the cause, has only power to appropriate to its use a strip of land extending westward to the bluff, for a distance of seven hundred and twenty (720) feet, for the western approach of its bridge (and the width thereof to be two hundred feet), this being the length of the approach as fixed by the Secretary of War, it being his duty by the terms of said Act of Congress to ascertain and fix the length of said approach.
>
> And you are further instructed that you will fix and assess such damages in favor of the defendants against plaintiff, for such strip of land as you may consider they have sustained by reason of the appropriation thereof.

Result of Trial

The jury having **duly** considered the instructions returned **the following verdict** upon which the Court entered judgment July 1st, 1903, to-wit:

Verdict

> We, the jury, find the defendants R. G. Stone and Nannie E. Finley, and R. M. Finley, for the

appropriation of the following described real estate, situated in the County of Scott, State of Missouri, to-wit: A part of the S. E. and S. W. parts of private Survey No. 794, in twp. 30, R. 14 east, and in lot 2 of the N. E. ¼ of sec. 2, twp. 29 R. 14 east, being a tract of land 200 feet wide, 100 feet on each side of the center line of the approaches to the Southern Illinois and Missouri Bridge Co. as located and platted, beginning at a point on the east line of fractional sec. 24, twp. 30, R. 14 east, 1,240 ft. from the S. E. corner of said fractional sec.; thence run south 70 degrees 45 minutes east, 765 feet; thence by a one degree curve to the right 880 4-10 feet; thence south 59 degrees 45 minutes east, 924 8-10 ft.; thence by a 2 degree 30 minute curve to the left 1,289 3-10 feet; thence N. 87 degrees, 57 minutes, east to west bank of the Mississippi River. Said center line intersects the north line of twp. 29, 100½ feet west of the N. W. corner of lot 2 in the N. E. quarter of section 2, twp. 29, R. 14 E., and also intersects the west line of said lot 269 1-10 ft. south of the N. W. corner of said lot 2, have been damaged in the sum of ten thousand dollars.

T. A. MEDLEY, *Foreman.*

JUDGMENT

It is therefore considered and adjudged that defendants have and recover of and from the plaintiff the sum of ten thousand dollars as their damages by reason of the appropriation of the land in the verdict described by the plaintiff, together with the legal cost herein expended, and that therefor they have execution. It further appearing to the Court that plaintiff has heretofore paid into Court the sum of $8,120.00 on account of said damages; now, therefore, upon payment by the plaintiff of a further sum of $1,880.00 into Court for the use and benefit of defendants, it is ordered that the easement for the use and purposes of plaintiff, its successors or assigns, for bridge

approach, roadways, terminal yards and necessary appurtenances, be vested in plaintiff and divested of defendants and their assigns in the real estate hereinbefore in the jury's verdict, which is made a part of this judgment and decree, fully described.

[Defendants saved exception at the time to the foregoing.]

[It will be noted that the judgment of the Court condemns the land of defendants not merely for a "bridge approach", but also for "*terminal yards and necessary appurtenances*". Defendants claim that said judgment is absolutely void, and in violation of the constitutional rights of the defendants (as assigned in their motion for new trial) because the uses, above specified as part of the uses to which the property of defendants is to be devoted under the judgment of the trial court, are not objects and purposes for which plaintiff has a right to take the land of defendants by process *in invitum*.]

Motions for Review

Within due time, defendants filed their motion for a new trial in which various errors assigned upon this review were fully set forth and specified, in so far as said specification is necessary for this review. (Printed Record, p. 178.)

Defendants also filed a motion in arrest of judgment in which it is claimed that the petition fails to state facts sufficient to authorize the Court to proceed to condemn the property in question (Printed Record, p. 181).

Said motions are set forth at large in the printed transcript of the record (pp. 178–182).

Your Honors will find, in the motion for new trial, among other grounds assigned, that defendants com-

plained and excepted to the verdict upon grounds which will be discussed in this Court, as will be observed by the reading of the *ninth*, *tenth*, *thirteenth*, *fourteenth* and *fifteenth* grounds assigned in the motion for new trial. The points which will be presented to the Court on this writ of error were **specifically made in** the trial court.

In the MOTION IN ARREST OF JUDGMENT defendants likewise objected to the order appointing the commissioners (for valuation of the land) inasmuch as it was then claimed the order was **void** in so far as it authorized a valuation **beyond the "720 feet thereof, the length of the approach to said bridge fixed by the Secretary of War."** (Printed Record, p. 181.)

APPEAL TO SUPREME COURT

The defendants' motions for new trial and in arrest were overruled by the Court, and exceptions thereto were duly saved by bill of exceptions filed in proper time. An appeal was regularly taken by defendants (now plaintiffs in error) from the judgment of condemnation to the State Supreme Court; all of which steps fully appear in the printed transcript (pp. 21-22, 182).

IN THE SUPREME COURT OF MISSOURI

The case was heard in the SUPREME COURT OF MISSOURI upon the trial record which appears in the printed transcript here, as well as upon **assignments of error** made in that Court by appellants (defendants below) now plaintiffs in error, which assignments of error in the Supreme Court of Missouri, fully present the points which will be submitted on this writ of error.

[See Assignments of Error in Supreme Court of Missouri, as printed in full in Transcript of Record in this Court, pp. 183–185].

Decision of Missouri Supreme Court

The Supreme Court of Missouri, five Judges concurring and two dissenting, announced a judgment affirming that of the Circuit Court above described. The learned opinion of the Supreme Court of Missouri appears in full in the Printed Record of this Court (pp. 187–193). The official report and an unofficial report of the same opinion are to be found in

So. Ill. & Mo. Bridge Co. v. Stone, 194 Mo. 175
So. Ill. & Mo. Bridge Co. v. Stone, 92 S. W. Rep. 475.

Writ of Error to This Court

To the foregoing judgment of the Supreme Court of Missouri (affirming the judgment of the Circuit Court of Dunklin County) plaintiffs in error (defendants below) sued out the pending writ of error, observing the usual formalities (Printed Record, pp. 196–203). In their assignment of errors at that time duly filed along with the application for the writ of error, the various points which will be mentioned in the **specification of errors** in this Court were duly presented, as will be found in the printed transcript (pp. 198–202).

The writ of error was duly returned into this court after service of citation duly made and acknowledged (Printed Record, p. 2) and the case was then regularly docketed for hearing in due course.

Missouri Statutes

There are certains statutes in Missouri, which, your Honors will observe from the opinions delivered in the Missouri Supreme Court, are supposed to sanction the proceedings under review.

For the convenience of your Honors we quote those statutes as follows:

(Rev. Stats., Mo., 1899.)

"Sec. 1024. **Foreign corporations to keep office in this State, when—subject to same conditions as domestic concerns—not permitted to encumber property, when.**—Every corporation for pecuniary profit formed in any other State, territory or country, before it shall be authorized or permitted to transact business in this State, or to continue business therein if already established, shall have and maintain a public office or place in this State for the transaction of its business, where legal service may be obtained upon it, and where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provisions governing such corporation; and such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, **and shall have no other or greater powers.**"

* * * * * * *

"Sec. 1351. **Bridge companies, how formed.**—Any number of persons, not less that ten, **may form a company for the purpose of constructing and maintaining a bridge over any of the streams of water** or any part of such streams which may be **within this State,** for public use, for the crossing of persons or property, according to the provisions of this article."

"Sec. 1352. **May condemn lands.**—In case it may become necessary for any bridge corporation here-

tofore **organized or that may be hereafter organized under section 1351,** to take or appropriate any lands of persons or corporations for **approaches,** road, foot or wagon-ways of such bridge corporation, and the owners of said property can not agree with said corporation upon the proper compensation to be paid, or in case the owner is incapable of contracting, unknown or a non-resident of the State, then the said property may be taken by said bridge corporation in the same manner that is provided for by law in relation to the appropriation and valuation of lands taken for telegraphs, macadamized, graded, plank and railroad purposes."

"Sec. 1353**d. Rights and privileges.**—Any bridge corporation organized under this article shall have the right to issue bonds or other evidences of indebtedness, negotiate loans for the construction of said bridge, secure such indebtedness by deed of trust or mortgage on the property of said corporation, and may consolidate its franchises and property with those of any bridge corporation within this State, or any corporation within an adjoining State, the bridges of which corporations connect."

* * * * * *

It is provided further by the general laws of Missouri governing railroad corporations that, in the exercise of the right of eminent domain, such a railroad corporation may "lay out its road, **not exceding one hundred feet in width**" and construct the same (R. S., Mo., 1899, sec. 1035).

ASSIGNMENTS OF ERROR

The assignments of error made on the application for the pending writ of error present the various points upon which the judgment under review is challenged, and on each of those assignments plaintiffs in error rely on this hearing in the Supreme Court of the United States.

We insert here said assignments as they appear in the Transcript (pp. 198–203).

UNITED STATES OF AMERICA, *ss*:

In the Supreme Court of the United States.

(No. 12089 in the Supreme Court of Missouri.)

R. G. STONE, R. M. FINLEY, and NANNIE E. FINLEY, (Appellants), Plaintiffs in Error,

vs.

SOUTHERN ILLINOIS & MISSOURI BRIDGE COMPANY (Respondent), Defendant in Error.

ASSIGNMENT OF ERRORS BY PLAINTIFFS IN ERROR

Now come R. G. Stone, R. M. Finley and Nannie E. Finley, Appellants in the Supreme Court of Missouri and plaintiffs in error in a writ of error to the Supreme Court of Missouri from the Supreme Court of the United States, duly allowed, in the above entitled cause of Southern Illinois & Missouri Bridge Company (Respondent) and defendant in error ads. R. G. Stone, R. M. Finley and Nannie E. Finley (appellants) in said Supreme Court of Missouri, and plaintiffs in error in said writ of error in the Supreme Court of the United States in said cause, and upon a judgment in the Su-

preme Court of Missouri at the October Term thereof, A. D. 1905, in the above entitled cause, the said R. G. Stone, R. M. Finley and Nannie E. Finley, defendants and appellants in the Supreme Court of Missouri and plaintiffs in error in said writ of error returnable into the Supreme Court of the United States, according to law, **do say**, by their attorneys and counsel in this behalf, that, **in the record and proceedings in said cause there is manifest error** to their prejudice upon the merits of said cause, and **they assign error in said record** and proceedings in this, to-wit:

1

That said Supreme Court of Missouri erred in affirming the judgment of the Circuit Court of Dunklin County, Missouri, and in overruling each of the assignments of error of said plaintiffs in error in said Supreme Court.

2

That the learned opinion of the Supreme Court of Missouri **erred in denying to appellants rights, privileges and immunities claimed by them under the Constitution of the United States** (Article 6) **which makes the Acts of Congress the Supreme law of the land, and under the Acts of Congress regulating the construction of bridges across the Mississippi River** (30 U. S. Stat. L., p. 1151, sec. 9) and under the particular Act of Congress, approved January 26, 1901, authorizing the construction of a bridge across the Mississippi at or near Gray's Point, which prescribed the terms and conditions on which alone the right to construct such a bridge was granted.

3

That the learned opinion of the said Supreme Court of Missouri erred in denying to appellants the equal protection of the law and due process of law as guaranteed by the 14th Amendment to the Federal Constitution and in overruling the 27th assignment of error filed in this Court heretofore, as follows:

> "The judgment of the Circuit Court in this cause is an invasion of the rights, privileges and immunities of defendants under the Constitution of the United States, in that said Circuit Court refused to give effect to the 5th Amendment and 14th Amendment of the Constitution of the United States, declaring that private property shall not be taken for public use without just compensation, or without due process of law."

4

That the learned opinion of the said Supreme Court of Missouri is erroneous in denying to appellants the rights, privileges and immunities accorded to them by the 5th Amendment to the Constitution of the United States, declaring that private property shall not be taken for public use without just compensation, by affirming the judgment of the Circuit Court of Dunklin County, Mo., to the same purport.

5

That the learned opinion of the said Supreme Court of Missouri is **erroneous in holding that the plaintiff is authorized to condemn property as a part of the bridge** authorized by the aforesaid Act of Congress, beyond the lines defined by the said Act of Congress and by the map approved by the Secretary of War under said Act of Congress, and in affirming the judgment of the Circuit Court below to that effect.

6

Because the learned opinion of the said Supreme Court of Missouri is erroneous in **denying to appellants the rights accorded to them by the aforesaid Act of Congress approved January 26, 1901,** whereby the right **to commence** the erection of said bridge structure was limited to one year **"from date of the approval"** of said Act, and the undisputed evidence in this record shows that the construction of **said bridge was not commenced within that period;** and the learned opinion of the said Missouri Supreme Court does not even allude to that point which was made with great distinction in appellants' Brief in said Court (p. 50) but in affirming the judgment of the Circuit Court below it denies to appellants (plaintiffs in error) the rights to which they are entitled under said Act of Congress.

7

The learned opinion of the said Supreme Court of Missouri denies to appellants the immunity claimed by them from condemnation of their real property in this case, which immunity is afforded to them by the Constitution and laws of the United States, in that the said learned opinion of the said Missouri Supreme Court does not grant but **denies the contention made by appellants** to the effect that the extent to which the said bridge might reach, under the said Act of Congress, approved January 26, 1901, **was marked by the map** approved by the Board of Engineers of the United States and the Secretary of War under the Act of Congress authorizing the construction of a bridge at the point in question.

8

That the Circuit (trial) Court below **erred in refusing to declare the law** as requested in the following instruction, asked by defendants (appellants) at the trial, to-wit:

> "The Court instructs the jury that plaintiff, under its charter and the Act of Congress authorizing it to build the bridge and approaches thereto, in view of the testimony submitted in the cause, has only power to appropriate to its use a strip of land extending westward to the bluff for a distance of seven hundred and twenty (720) feet, for the western approach of its bridge (and the width thereof to be two hundred feet) this being the length of the approach as fixed by the Secretary of War, it being his duty by the terms of said Act of Congress to ascertain and fix the length of said approach.
>
> And you are further instructed that you will fix and assess such damages in favor of the defendants against plaintiff, for said strip of land, as you may consider they have sustained by reason of the appropriation thereof."

And that the Supreme Court of Missouri erred in affirming said ruling by affirming said judgment of said Circuit Court, and thereby depriving appellants (defendants) of their rights under the Constitution and Acts of Congress of the United States claimed at the time by appellants in said Circuit Court and in said Supreme Court of Missouri.

9

That the Circuit Court below erred in said cause by **assuming jurisdiction to condemn** and to appropriate the land of defendants (appellants) **beyond the limits**

defined for said bridge and its approaches by the Act of Congress of the United States, approved January 26, 1901, and **beyond the limits therefor fixed by the map approved by the Secretary of War,** pursuant to said Act of Congress; and the Supreme Court of Missouri erred in affirming in that particular the decision and judgment of said Circuit Court.

10

That said Circuit Court below erred in said cause **by deciding adversely to the second defense set up in defendants'** (appellants') **amended answer** which defense in substance **asserted the claim of said defendants to immunity from having their said land** (condemned by the proceedings herein) **subjected to appropriation against their will,** and invoked the **Federal statute authorizing the construction of said bridge** (approved January 26, 1901) and the map (approved thereunder by the Secretary of War) **as a bar to the taking of their land** for a bridge approach **beyond the line marked therefor** by said map on the Missouri side of the river; and the Supreme Court of Missouri erred in affirming said ruling and decision of said Circuit Court to that effect, and thereby depriving appellants and defendants of rights secured to them by said Act of Congress.

11

That the said Circuit (trial) Court erred in said cause by giving the following instruction asked by plaintiff (respondent) against the objection and exception of defendants (appellants), to-wit:

> "The jury will consider the benefits, if any, and the disadvantages, if any, resulting to the remainder of defendants' said property from the ap-

propriation by plaintiff Bridge Company, of the strip of land in question for the purpose of its bridge and approaches. The benefits to be considered and allowed by the jury are the direct and peculiar benefits, if any, which result to the remainder of defendants' said property and not the general benefits which defendants derive in common with the other land owners in the vicinity from the building of the bridge and its approaches."

That in giving said instruction said trial court authorized the taking of defendants' land without just compensation and thereby deprived them of their rights under the 5th Amendment to the Constitution of the United States invoked by said defendants in said trial court; and the Supreme Court of Missouri erred in affirming said ruling.

12

That the Circuit Court and the Supreme Court **erred in this cause by deciding in effect that the petition for condemnation herein was sufficient in law,** when said petition **fails to allege facts essential to show compliance with the said Act of Congress** (approved January 26, 1901) authorizing the construction of said bridge, without which compliance the said structure is not a lawful structure.

13

That the petition in this cause is insufficient in law to authorize condemnation of said defendants' land sought thereby to be appropriated; and said Circuit and Supreme Courts of Missouri erred in deciding said petition to be sufficient and thereby denied the defendants (appellants) the right they invoke to protection of the 5th Amendment to the Federal Constitution.

14

Upon the undisputed facts neither the Circuit nor Supreme Court of Missouri had power to authorize the taking of the land of defendants (described in the petition) and the taking thereof by these proceedings by the decision of said Courts deprives defendants of rights secured by the 5th and **14th amendments to the Constitution** of the United States.

15

The Supreme Court of Missourt erred in deciding that the commissioners' report of the assessment of damages was competent evidence at the trial of said cause, and in affirming the judgment of the said trial court, admitting same in evidence against objection of defendants for incompetency and irrelevancy.

16

That the (trial) Circuit and Supreme Courts of Missouri erred in holding that **plaintiff (respondent) had the power of eminent domain** and the right to condemn the Missouri land of defendants (mentioned in the petition herein) by virtue of a charter granted by the State of Illinois; and thereby depriving defendants of the right and **immunity they claimed** (under 30 U. S. Stat. at Large, 1151) in respect of **bridges over navigable rivers.**

17

Under the Constitution of the United States, which makes the Acts of Congress **the supreme law of the land** (Const. U. S., Art. 6) and the action of the Secretary of War under the Act in this case, there was **no power in the Courts of Missouri to condemn the**

strip of land of the defendants described in the judgment herein, beyond seven hundred and twenty (720) feet from the Mississippi River on the Missouri side.

18

The Circuit Court **erred in submitting the cause to the jury,** under the documentary and undisputed evidence to the effect that plaintiff has **not complied with the Act of Congress** of January 26, 1901, which alone authorizes the construction of said bridge, and the Supreme Court erred in affirming said ruling.

19

The judgment of the Circuit and Supreme Courts in this cause is an invasion of the rights, privileges and immunities of defendants under the 14th Amendment of the Constitution of the United States, declaring that no person shall be deprived of property **without due process of law.**

20

The judgment of the Circuit and Supreme Courts in this cause is an invasion of the rights, privileges and **immunities of defendants under the Constitution of the United States,** in that said Courts **refused to give paramount force to the Act of Congress** in evidence, approved January 26th, 1901, and thereby the Circuit and Supreme Courts refused to give defendants the benefit of the Constitution of the United States and Article 6 thereof, declaring that said Constitution and the laws of the United States made in pursuance thereof shall be the supreme law of the land.

21

The judgment of the Circuit and Supreme Courts in this cause is an invasion of the rights, privileges and

immunities of defendants under the Constitution of the United States, in that said Circuit Court refused to give effect to the 5th Amendment and 14th Amendment of the Constitution of the United States, declaring that private property shall not be taken for public use without just compensation, or without due process of law.

22

The judgment of the Circuit and Supreme Courts in this cause is an invasion of the rights, privileges and immunities of defendants under the Federal Constitution because said judgment does not accord supreme effect to the Act of Congress aforesaid.

23

The trial court erred in permitting the compensation, which defendants were to be paid for their land, to be reduced by supposed "benefits" to other land of defendants, contrary to the terms of the Constitution of Missouri and to the provisions of the Federal Constitution above cited.

For the foregoing prejudicial errors, and each of them, affecting the merits of this cause (appellants) plaintiffs in error pray a reversal of the judgment of the said Circuit Court of Dunklin County, Missouri, and the judgment of affirmance thereof by the Supreme Court of Missouri.

And the said R. G. Stone, R. M. Finley and Nannie E. Finley as plaintiffs in error pray that the judgment aforesaid, for each one of the errors aforesaid and for other errors in the records and proceedings in said cause whereby the said plaintifis in error have been by

said judgment **deprived of their rights, privileges and immunities as citizens of the United States,** and for each of the errors and matters above assigned, be reversed, annulled and held for naught, and that the said plaintiffs in error may be restored to all things which they have lost by reason of said judgment of the said Supreme Court of the State of Missouri and by the judgment of said Circuit Court of Dunklin County, Missouri, affirmed thereby.

R. G. STONE,
R. M. FINLEY &
NANNIE E. FINLEY,
Plaintiffs in Error,
BY SHEPARD BARCLAY,
Their Attorney and of Counsel.

STATE OF MISSOURI, *ss:*

The foregoing assignment of errors has been presented and filed, along with the petition for writ of error by counsel for appellants (plaintiffs in error) in the said cause mentioned therein, this 15th day of March, 1906.

THEODORE BRACE,
Chief Justice of the Supreme Court of Missouri.

Attest, Seal of said Court,
JNO. R. GREEN,
Clerk of the Supreme Court of Missouri.

For convenience of treatment of the case here, we condense the foregoing assignments into shorter form to exhibit the final contentions of plaintiffs in error, concerning the vital points of controversy.

SPECIFICATIONS OF ERROR

The plaintiffs in error specify the **following errors** in the judgment, record and proceedings of the SUPREME COURT OF MISSOURI and by reason of each thereof pray that the judgment of said Court be reversed with such directions touching further proceedings as may be just.

1st Specification of Error

The judgment under review is erroneous in that the learned opinion and judgment of the Supreme Court of Missouri erred in denying to plaintiffs in error rights, privileges and **immunities** claimed by them under the Constitution of the United States, which makes the Acts of Congress the supreme law of the land, and under the Acts of Congress **regulating the construction of bridges** across the Mississippi River (30 U. S. Stat. L., p. 1151, sec. 9) and under the particular Act of Congress, approved January 26, 1901, authorizing the construction of a bridge across the Mississippi at or near Gray's Point, which prescribed the terms and conditions on which alone the right to construct such a bridge was granted.

Plaintiffs in error claim that the legislation of Congress authorizing the construction of this bridge is **exclusive of any legislation** by the State of Missouri; and that **by force of said Federal legislation**, the **limits of the bridge and approaches** are defined (as shown by the map and design approved by the Secretary of War) to an area (on the west side of the Mississippi River) distant 720 feet from the river bank. Hence, **under that Federal legislation,** land of the plaintiffs in error beyond

that limit can not be condemned as part of the bridge approach. The Federal law, **having treated that subject definitely,** should be held **to exclude** any authority of Missouri law to condemn land for this bridge over the Mississippi **beyond the area marked by the Act of Congress** and the map of the Bridge Company approved by the Secretary of War (as provided by the special Act which alone authorizes the bridge to be constructed).

31 U. S. Stat. L. 741, ch. 181
Bridge Co. v. U. S., 105 U. S. 475
Wisconsin v. Duluth, 96 U. S. 387

The record proper in the case, the petition of defendant in error (on which the proceedings are based) the rulings upon instructions at the trial (preserved for review by bill of exceptions) and various motions by the plaintiffs in error, present this question for review.

2nd Specification of Error

The judgments of the Circuit and Supreme Courts of Missouri are erroneous because the learned opinion of the said Supreme Court of Missouri erred in denying to plaintiffs in error the equal protection of the law and **due process of law** as guaranteed by the 14th Amendment to the Federal Constitution, and in overruling the 27th assignment of error filed in the Missouri Supreme Court heretofore, to that effect.

Plaintiffs in error respectfully claim that proceedings, under **pretended sanction of Missouri statutes,** to condemn a BRIDGE APPROACH **as part of a bridge** over the Mississippi, which part is **not approved** or **sanctioned** by the Federal Act of Congress applicable to the precise facts in judgment, is not "**due process of law**", and

takes the land for **private use**, as there is no authorized **"public use"** for the taking.

Muhlker v. Railroad, 197 U. S. 544
Railroad v. Nebraska, 164 U. S. 403

3d Specification of Error

The judgment under review is erroneous because the learned opinion of the Supreme Court of Missouri denied to plaintiffs in error the rights accorded to them by the aforesaid Act of Congress approved January 26, 1901, whereby the right to commence the erection of said bridge structure was limited to one year "from date of the approval" of said act, and the undisputed evidence in this record shows that the construction of said bridge was not commenced within that period; and the learned opinion of the said Missouri Supreme Court [redacted] in affirming the judgment of the Circuit Court below denies to appellants (plaintiffs in error) the rights to which they are entitled under said Act of Congress, which with the Constitution forms the "Supreme Law" of the land.

U. S. Const., Art. 6

The undisputed evidence **given by the engineer of the Bridge Company** is that they commenced "to build the bridge", "along in April", 1902 (Printed Record, p. 23).

But the Act of Congress required the **"construction** of the bridge" to be **"commenced within one year"** from the "date of approval" of this Act (January 26, 1901). It was not begun until April, 1902.

The terms of such a statute impose conditions imperative. Not only must they be obeyed, but any petition for relief based on such a Federal law, **involving the taking of private property** without consent of the owner, should **affirmatively** show that the conditions have been performed.

Penn. Ry. Co. v. Balto. & N. Y. Ry. Co., 37 Fed. 129

In the case at bar, not only is there **no showing of compliance** with the Act, as is essential, but there is **affirmative** showing of **non-compliance** (Printed Record, p. 23).

This point was raised in many ways in the trial court as is shown by the record proper as well as in the Missouri Supreme Court.

4th Specification of Error

The trial court erred in refusing by an instruction to declare the law to be as requested by defendants (now plaintiffs in error) to-wit:

> "The Court instructs the jury that plaintiff, under its charter and the Act of Congress authorizing it to build the bridge and approaches thereto, in view of the the testimony submitted in the cause, has only power to appropriate to its use a strip of land extending westward to the bluff, for **a distance of seven hundred and twenty (720) feet,** for the western approach of its bridge (and the width thereof to be two hundred feet), this being the **length of the approach as fixed by the Secretary of War,** it being his duty by the terms of said Act of Congress to ascertain and fix the length of said approach.
>
> And you are further instructed that you will fix and assess such damages in favor of the defend-

ants against plaintiff, for said strip of land, as you may consider they have sustained by reason of the appropriation thereof."

And the Supreme Court of Missouri erred in approving said ruling by affirming said judgment of the Circuit Court, and thereby depriving plaintiffs in error (defendants below) of their rights **under the Constitution and Acts of Congress of the United States,** claimed at the time by plaintiffs in error, in said Circuit Court and in said Supreme Court of Missouri, with all proper formalities and exceptions required by the procedure and practice of said Courts.

The right or immunity claimed by plaintiffs in error is the right to have the Act of Congress and the map defining the bridge approach in Missouri respected and OBEYED, touching the extent of the **"bridge and approaches thereto"**, as pointed out in the first section of the Act authorizing the construction thereof.

"The question is one of *power*". The State of Missouri has no power to take land for purposes of an approach to a bridge over the Mississippi except within the limits of the bridge as fixed by the federal laws.

Chicago v. Law, 144 Ill. 569

5th Specification of Error

The judgment to which the writ of error is directed is erroneous and an invasion of the rights, privileges and immunities of plaintiffs in error under the Constitution of the United States, in that said Courts **refused to give paramount force to the Act of Congress in evidence,** approved January 26th, 1901, and thereby the Circuit and Supreme Courts refused to give defendants

the benefit of the Constitution of the United States and Article 6 thereof, declaring that said Constitution and the laws of the United States made in pursuance thereof shall be **the supreme law of the land.**

The decisions of the Missouri State Courts are also directly at variance with the general Act of Congress (A. D. 1899) which forbids persons constructing any **"bridge"** over any **"navigable water"** of the United States, **"to deviate from such plans"** (approved by the Secretary of War) therefor, "either before or after completion of the structure", without like approval of any proposed change in such plans.

30 U. S. Stat. L. 1151, sec. 9

The Act last cited declares that **"it shall not be lawful"** to construct any such bridge until the plans have been approved by designated Federal authorities. The Bridge Act marks the limits of authorization, and no State can enlarge or restrict those limits, because the Federal law is of paramount authority.

An **"approach"** is an essential part of the bridge.

Francis v. Township, 179 Pa. 195

Whitcher v. Sommerville, 138 Mass. 455

The 5th section (of the Act itself authorizing this structure) requires the **"approaches** to the bridge, built under this Act", to be **"designated,"** and constructed so as not to interfere with the free discharge of the river, etc. The western approach was duly "designated", but where is the authority **for its present enlarged dimensions?**

6th Specification of Error

The Missouri Statutes relied on by defendant in error (R. S., Mo. 1899, secs. 1352, 1024) do not purport to

confer authority to condemn land for an approach to **a bridge over the Mississippi River.** If construed to confer such authority, they would be **unconstitutional** as in conflict with the Federal organic and statutory law, giving Congress authority to enact the **"supreme law"** on that subject.

The decision of the State Supreme Court to the contrary is not warranted, as against the claim of the plaintiffs in error to the protection of the "Supreme Law" applied to the facts here in judgment. There is **no iota** of the only authority which can sanction the construction of a bridge, over the Mississippi, to support the appropriation of the land of plaintiffs in error for bridge purposes.

The pretended authority expressly confines the extent of the bridge within narrower bounds than those which the Missouri Courts suffered defendant in error to take by the judgment under review.

The verdict and record proper disclose this error to which plaintiffs in error excepted in many forms duly preserved by bill of exceptions.

7th Specification of Error

The petition **does not state facts sufficient to authorize the taking** of the land in question under the Federal statutes cited. It does not aver that the land is sought to be acquired "*for public use*", and it does not aver the facts showing compliance with the Federal Act prescribing the terms on which alone **"and subject to its limitations"** (sec. 2) the bridge was authorized.

N. Y. Central case, 5 Hun 86
Railroad v. Railroad, 37 Fed. 129
Miller v. N. Y., 109 U. S. 385
C. & N. W. Ry. v. Galt, 133 Ill. 657
Evergreen Assn. v. Beecher, 53 Conn. 551

BRIEF OF THE ARGUMENT

I

The laws of Congress governing the location and limits of the bridge and approach in question are paramount.

The defendant in error has no power to condemn that part of the land lying west of the 720-foot **approach**, as fixed by the Secretary of War, for the purpose of constructing and operating "terminal yards" and railroad terminals, or as part of the bridge.

The Act of Congress empowered the Bridge Company to construct and operate a bridge and approaches thereto and required it to submit to the Secretary of War a map and drawing of the bridge and approaches, to be referred to the Board of Engineers, U. S. Army, for examination and report. To be a **lawful structure** the bridge must be built in accordance with the plans as recommended by said Board of Engineers and the Secretary of War and all requirements of the Act observed.

Plaintiffs in error introduced in evidence the certificate of the Secretary of War, showing that the western approach to the bridge (as fixed by the Bridge Company and approved by the U. S. officers mentioned in the Act of Congress) extended only 720 feet westwardly from the west bank of the river. This appeared not only by the SCALE on the face of the map, but by the undisputed evidence at the trial.

There is a bluff some 60 or 70 feet high, 720 feet back from the bank of the river. From the bluff westwardly the land is broken and hilly. Westwardly through this

broken and hilly country, defendant in error laid off a STRIP 200 FEET WIDE (the bridge is only 29 feet wide) across the land, extending back to the Cotton Belt Railroad, a distance of over 2 miles.

The testimony of experts, civil engineers and experienced railroad men, taken on the trial, establishes that, as a matter of fact, the approach to the bridge ended when the bluff was reached, at the end of the 720 feet, as defined by the map approved by the Secretary of War. The land from the top of the bluff westwardly, beyond 720 feet, cannot be taken lawfully as part of the bridge under the Act of Congress, and map approved by the Secretary, because excluded therefrom by their very terms.

The drawing which defendant in error offered to the Federal engineers, and which the Secretary of War (now the Secretary of State) approved, is reproduced in the record here (p. 68). It defines the western approach at 720 feet from the western pier (No. 6) as shown on the map. When defendant in error submitted that map and secured its approval as an accurate delineation of the western approach to the bridge, it **became bound by its own act until**, at least, the Federal supervising authority approved a change.

Lake Shore, Etc., Co. v. B. & O. Co., 149 Ill. 272

30 Stat. L. (U. S.) 1151, sec. 9

It was not competent for defendant in error of its own motion, and without Federal sanction, to tack on to the bridge a great bunch of **railway terminal facilities** called "*terminal yards*" extending more than two miles from the river, and dub the result a "**bridge ap-**

proach". The genial and learned counsel, whose name is subscribed to the petition, had a grim conception of the humor of his effort in that direction when he described the necessity which impelled the "taking" of the real estate to be **"for the laying of tracks and the handling of business over and across plaintiff's bridge"**. A bridge approach more than two miles long was never approved by the Federal authority in this case. On the contrary, the official approved drawing limited the approach to 720 feet from the last western river pier.

The Secretary of War has the right, by the charter of the Bridge Company and the Act of Congress, to regulate the "reasonable tolls" for the use of the "bridge and approaches"; but if the official **approach** ends at the 720-feet limit and defendant in error may, nevertheless, abrogate that limit and extend its **"terminal yards"** (by the same supposed authority only) under the stimulus of the law of eminent domain, will the Secretary of War, let us ask, have the power to regulate the tolls over the "terminal yards" as well? That may be an interesting question before many years.

To us it seems clear that, under the Federal laws, whose construction must determine this case, it is a serious error to suppose that the drawing approved by the Secretary of War does not limit the right to extend the bridge approach beyond the lines marked therefor in that drawing.

The claim that the State statute attempts to provide for such bridges by general laws is a grave error. Section 1351 (R. S. 1899) **does not authorize the formation of corporations to build bridges across the**

Mississippi. The Missouri State Constitution expressly authorizes special legislation on that subject because it is necessarily the only practicable legislation. The Missouri Constitution declares that special laws may be enacted **"for the erection of bridges crossing streams which form boundaries between this and any other State"** (Const., Mo., Art. 4, Sec. 53).

The general law for bridge companies does not apply, and **was not intended to apply to bridges crossing the Mississippi.** It applies, by its express terms, to the construction of bridges "over any of the streams of water or **any part of such streams which may be within this State"** (R. S. 1899, sec. 1351). With the Constitution of Missouri and this law before us is it not certain that a corporation to build a bridge over the Mississippi was never intended, *under* this law, to be created?

But if such was the intent, such a statute so construed would be void **as unconstitutional because in conflict with the terms of the Federal Act of Admission of Missouri to the Union,** with the Missouri Constitution which confirms those terms concerning the Mississippi River, which is a public "common highway", free to all citizens of other States as well as of Missouri (R. S. 1899, p. 57, sec. 2, Const. Mo., Art. 1, sec. 1) and in conflict with the Federal Acts cited which are of paramount force as the "Supreme Law" sanctioned by the Constitution of the United States.

Congress alone has the right now to authorize a bridge *across* the Mississippi, for our State boundary is the middle of its main channel (R. S., Mo., 1899, p. 55, 51 sec. 2). Missouri has no State jurisdiction **beyond that line** to authorize a corporation to construct a perma-

nent structure which might impede navigation of that stream. The Federal law on that subject is now too clear to admit of doubt, and it is likewise conclusive (as it seems to us) of the case at bar.

30 U. S. Stat. L., p. 1151, sec. 9
South Carolina v. Georgia, 93 U. S. 4
Green Bay Co. v. Paper Co., 172 U. S. 81

Under the existing Federal law Congress has exercised its jurisdiction over navigable waters by **forbidding the erection of such structures without previous authority** given by Congress. The Act in which this most important requirement is fully defined is as follows:

> "That it shall not be lawful to construct or commence the construction of any **bridge,** dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, **navigable river,** or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War." (30 Stat. L., 1151.)

The legislation of Congress on this subject necessarily prohibits the operation of any local statute not in harmony therewith.

The entire approach to every such interstate bridge is considered by the legislation of Congress as subject to the supervisory control of the Federal authority. When the bridge is **once located and defined,** the same can not be changed without express authority.

In re Bridge Co., 108 N. Y. 483

The obvious practical necessity of having the entire structure (including the **approaches)** subject to Federal jurisdiction, is the idea underlying the unmistakable purpose of the Federal law to have the structure carefully and fully **defined by plans approved** by the highest Federal scientific authority, and to **remain as so designed.** If it **"shall not be lawful to deviate from such plans, either before or after completion of the structure"** (as the Federal law commands) how can any State authority enlarge the scope of those plans, **outside their plain terms,** as is claimed by defendant in error in this case?

II

The Acts of Congress, authorizing the construction of this bridge, operate as **limitations** *on the area of the structure (and its approaches mentioned therein as a part thereof).*

The Federal Act authorizing this bridge does not grant the right of condemnation of land for the purposes of the bridge. It mentions the defendant in error, the Bridge Company, as **"a corporation created and organized under and by virtue of the laws of** *the State of Illinois"* (sec. 1).

Those laws **do not confer on a bridge company** the right of **eminent domain, even in Illinois.**

Rev. Stats., Illinois, 1899, ch. 32, sec. 1, p. 433
Same statute in evidence in this case (Record, p. 83)
Ill. State Trust Co. v. R. R., 208 Ill. 420

The terms of the Act of Congress descend into minute particulars, regulating the form and extent of the proposed structure, and the bridge is required to conform to those terms. To quote (section 7):

> "the proposed bridge shall be a lawful structure **only when built in accordance with the plans** as recommended by the said Board of Engineers * * * and the Secretary of War."

Part of those plans limit the area of the western approach to a space of 720 feet from the river bank, as shown by the plat in evidence (Printed Record, p. 68). That plan or design, while it **authorizes** the construction of the western approach to the bridge, as part of the latter, to the extent of 720 feet from the river, likewise **limits** the approach **within that area.** It is a PROHIBITION of any right by the Bridge Company to claim, as part of the **"bridge and approaches thereto"** (sec. 1 of the Act of Congress, 1901) any **area in excess** of that defined under the Act which forms the sole authority for erecting any part of the structure.

The Missouri statute in regard to local bridge companies recognizes the Federal statutes as paramount by excluding any authority for condemnation by any bridge company (organized under general law) to construct a bridge *across* the Mississippi River. The Mis-

souri statute **could not,** if it would, apply to more than **half the river** and does **not authorize** the construction of such a bridge across the Mississippi. On the contrary the State Constitution expressly takes that subject out of the domain of general legislation and authorizes special legislation **"for the erection of bridges crossing streams which form boundaries between this and any other State."**

Mo., Constitution, 1875, Art. 4, sec. 53
Mo. R. S. 1899, sec. 1351

The Missouri statute in regard to bridge companies (section 1351) if intrepreted by any State authority, however high, to authorize the construction of a bridge **across the Mississippi river,** is unconstitutional because in conflict with the Federal Constitution and laws which forbid any State from authorizing the erection of a bridge across the Mississippi River, without prior congressional sanction.

Act of Admission (R. S. 1899, p. 51, sec. 2)
30 U. S. Stat. L., p. 1151, sec. 9

The bridge company Act of Missouri does not confer the power of Eminent Domain on a corporation organized in another State, because it expressly provides that the condemnation of land which it authorizes is available only by bridge companies **"organized under section 1351".** The expression of those companies excludes others, but even if construed to confer that power, the State statute must yield to the **obvious limitations** imposed by the Federal laws cited.

The provisions of section 1351–1352 (Mo. R. S. 1899) apply **only to corporations organized under the Mis-**

souri law, and being particular and special provisions, they are to be given force rather than general language in sec. 1024, which some suppose to imply a grant of the power of Eminent Domain to foreign bridge companies by virtue of language which declares that foreign corporations shall **"have no other or greater powers"** than corporations **"of like character organized under the general laws of this State".** The more particular provisions of the statute in regard to bridge companies is paramount to the general language of the section governing all sorts and conditions of foreign corporations, even if the general language of the latter might otherwise have such effect.

Broom's Maxims, *p. 646
2 Hughes, Proced. p. 632
Rutherforth's Insts., p. 431
Grandy v. Casey, 93 Mo. 595
Trust Co. v. Railroad, 70 N. E. 357

A foreign corporation authorized to construct a bridge across the Mississippi River *by virtue of an Act of Congress* is not a corporation **"of like character"** to one organized under the laws of Missouri; because the general law of Missouri does not authorize the incorporation of a company to construct a bridge across the Mississippi River, **and could not do so under the existing Federal law.**

Act March 3, 1899, 30 U. S. Stat. L., p. 1151, sec. 9
6 Fed. Stats. (annotated) p. 805, sec. 9
Ill. State Trust Co. v. R. R., 208 Ill. 420

Under the Constitution and laws of the United States, defendant in error had no right to take any land beyond

"the territorial limits and conditions in said Act fully set out" (to quote the very words of its petition), but it has done so, nevertheless.

Before the bridge construction was begun, the Bridge Company defined the "territorial limits" of the western approach of the proposed bridge, by the drawing and plan thereof which was submitted to the Secretary of War, under the Act of Congress (authorizing the construction of the bridge). That said drawing and plan of the western approach of the proposed bridge were approved by the Secretary of War, January 16, 1902. According to said plan and drawing the western approach to said bridge **was not to include the whole strip of land sought to be taken by this suit.** No State Court of Missouri had jurisdiction to condemn the land of defendants or other persons, **beyond the boundaries fixed by said plan and drawing** of the western approach to said bridge, under said Act of Congress. Any bridge over this great river, other than that whose *integer* is defined by the map approved by the federal authorities, **"it shall not be lawful to construct"**, according to the very words of the Act of Congress.

30 U. S. Stat. L., p. 1151, sec. 9

The strip of land sought to be condemned under the petition is part of the so-called approach of the bridge which extends for some two and one-half miles west of the river. Plaintiffs in error say that it is not "*due process of law*", under the Fourteenth Amendment to the Federal Constitution, for the Bridge Company to appropriate any land beyond that defined as the bridge approach **in its own drawing and plan,** approved by the Secretary of War under said Act of Congress.

Muhlker v. Railroad, 197 U. S. 544

The said drawing and map were competent evidence.

Mo. R. S., 1899, sec. 3098
Wood v. Nortman, 85 Mo. 298

The Bridge Company has no power to condemn property in Missouri as the law now stands.

1st. The Missouri legislature, in delegating the power of eminent domain to corporations, expressly limited the right to "road, telephone, railroad, telegraph, or other corporations *created under the laws of this State* for public use, etc.".

Sec. 1264, Vol. 1, R. S. Mo. 1899
Holbert v. Ry. Co., 45 Iowa, top p. 27
Sec. 1352, R. S. Mo. 1899, relating to bridge corporations, confines the right to condemn to **"bridge corporations organized under sec. 1351"**.

A foreign corporation is not given any power to condemn by the above statutes. The power can not be implied; it requires an express legislative grant. All grants of govermental power are strictly construed, especially with respect of the power of eminent domain.

Lewis, Eminent Domain, Vol. 1, secs. 240, 253, 254
West. Union Co. v. Penn. R. R., 195 U. S. 540

2nd. The only thing upon which defendant in error bases its alleged right to condemn is the fact that it filed a copy of its Illinois charter with the Secretary of State of Missouri, and obtained a certificate from the Secretary of State "authorizing it to do business therein", as required by Sec. 1025, Vol. 1, R. S., Mo., 1899.

Does this give it power to condemn?

(*a*) It has no such power on the principle of comity between States; it will never be presumed that Missouri has delegated any part of its *sovereignty* to a foreign corporation. Judge Thompson says:

"It may be stated with confidence in every case that this power can not be exercised by a corporation created under the laws of one State without the consent of the legislature of that other State, *affirmatively expressed.*"

6 Thompson, Corporations, p. 6310

(*b*) To construe Sec. 1025 of Missouri as an affirmative grant of power to condemn, any Court must ignore a fundamental command of statutory construction, namely, to give effect to the *purpose* the legislature had in view in enacting the statute.

Section 1025 is not a *granting* statute, it is a *restraining* statute. It was not enacted for the purpose of conferring power on foreign corporations, but to regulate and restrain them in Missouri to the powers which they were **already exercising,** under the principle of comity between States. Having **no power to condemn** under the doctrine of comity, this statute, regulating and restraining the exercise of ordinary powers in Missouri, does not confer upon it any sovereign power whatever.

Statutes similar to section 1025 have existed in the different States of the Union for more than 30 years, but we have been unable to find where any Court has ever held that such legislation gave a foreign corporation the right of **eminent domain** or any other prerogative power, except the majority opinion of the Missouri Supreme Court in the case at bar. One directly to the contrary is

Ill. State Trust Co. v. R. R., 208 Ill. 420

We understand such legislation as intended to restrain foreign corporations and keep them within the **bounds of the ordinary privileges** accorded them by comity; and that such legislation was never intended to grant any additional power—certainly no **prerogative power.**

Tiedemann, Police Powers, Vol. 2, p. 983, sec. 213 and note 1.

Thompson, Private Corporations, Vol. 4, secs. 5470 and 5471

Attorney General v. Fidelity, Etc., Ins. Co., 6 Am. R. R. and Corp. Reports, p. ~~655~~ 605 and note 1

Hollingsworth v. Parish of Texas, 17 Fed. Rep., pages 114 and 115

22 Am. & Eng. Ency. of L. (2d ed.) page 916 and notes

Talbot *et al.* v. Hudson, 1 Thayers Cases Constit. Law, page 1017

Paul v. Virginia, 8 Wall. (U. S.) 168

Daggs v. Ins. Co., 136 Mo., p. 391

State v. Stone, 118 Mo., p. 401

List v. Com., 118 Pa. St. 327

Murfree on Foreign Corp., p. 98, sec. 119

Am. U. Telephone Co. v. W. U. Tel. Co., 67 Ala. 26

The Supreme Court of Illinois, construing a statute similar to the one in question, in Stevens v. Pratt, 101 Ill. 217, says: "The language of this statute is entirely that of *regulation and restriction* and not that of grant or prohibition. No corporation is granted the right to do business in this State."

3rd. But even if it should be held that the Missouri legislature meant to confer the right of eminent domain, the Bridge Company would still be without power to condemn, for the following reasons:

(*a*) Even if it should be held that Missouri has conferred upon it the right of eminent domain, it could not lawfully exercise the power in Missouri without showing beyond doubt its power to condemn property in Illinois, under the law of its being and also conformity to the federal law without the sanction of which no such bridge or approaches as are in question here could **lawfully** be **constructed.**

Bank of Augusta v. Earle, 13 Pet. 519
Morawetz on Corporations, secs. 960–963
Beach on Corporations, sec. 417, p. 690 (1891)
Canada Southern R. R. Co. v. Gebhard, 109 U. S. 537

Although the burden was on defendant in error to prove that it had power to condemn under the laws of Illinois, it has never produced any evidence whatever to show it had such power there. Even when the right of a foreign corporation to exercise merely usual and ordinary corporate powers is questioned, **the burden is on the corporation to prove its incorporation,** and also the extent of its powers under the laws of the State where it was created.

Clark & Marshall on Corporations, Vol. 1, sec. 178 (1901)

How much more imperative, therefore, it is that when it claims special and extraordinary franchises the burden is upon it to prove the grant of such franchises!

(*b*) Examination of the laws of Illinois will show that this corporation has no power to condemn in that State.

It claims to have been incorporated September 28th, 1900, under an Act of the General Assembly of Illinois entitled, "An Act Concerning corporations, approved April 18th, 1872, and all Acts amendatory thereof".

This Act of April 18th, 1872, as amended, and as it existed at the date of the alleged incorporation of this Bridge Company, will be found in Chapter 32, Hurd's Rev. St. Illinois, 1899, but although this chapter is broad enough to include a railroad bridge like that mentioned in the charter of defendant in error there is no authority conferred on it to condemn property.

Section 1 of said Chapter 32 provides "that corporations formed for the purpose of constructing railroad bridges shall not be held to be railroad corporations". This Bridge Company can not claim the right to condemn given to railroad corporations under the laws of Illinois.

The only other statutes of Illinois bearing on this subject are:

"An Act for the incorporation of Bridge Companies, approved April 10, 1872", which is almost identical with an Act of the Missouri Legislature enacted for the same purpose, approved March 19th, 1866; but this Illinois Act of April 10th, 1872, was repealed at a revising session of the Illinois legislature under the Constitution of that State of 1870.

See R. S. of Illinois 1874, sec. 832, p. 1044.

Chapter 137, R. S. Illinois 1874, relating to "toll bridges", over which the County Courts have control:

Section 14 of Chapter 137 and section 22 of Chapter 138 R. S. Ill. 1874, entitled "toll roads", authorize condemnation of land for "toll bridges", but the statutes referred to give no power whatever to this Bridge Company to condemn, and have no reference to the defendant in error corporation or any such bridge as it proposes to construct.

We treat this question as though those statutes of Illinois might be considered, but as the record stands now, the only Illinois statute was introduced by plaintiffs in error and it shows no right of Eminent Domain.

An examination of the laws of Illinois will, we believe, establish beyond dispute that the failure of defendants in error to introduce any of the laws of that State in evidence was because there is no law in that State authorizing it to condemn property; but in any event, whatever its power may be in Illinois, it has no such power in Missouri unless conferred upon it by some **valid** Act of the General Assembly of Missouri. No such power is given it by any express act, terms, nor, with all due respect, do we think it should be implied.

President v. Trenton Bridge Co., 13 N. J. Eq. 50

Clark & Marshall on Private Corp., sec. 854, p. 2734

Attorney General v. Delaware, Etc., Railway Co., 27 N. J. Eq. 647 and 648

Lehigh Railway Co. v. Mutchler, 42 N. J. L. 461

4 American & English Enc. of Law (2nd ed.), p. 930, par. 3 and notes

Middle Bridge Corp. v. Marks, 26 Me. 326

Luxton v. North River Bridge, 153 U. S. 530
State v. Boston, Etc., Railway Co., 25 Ver. 441 and 442
Crosby v. Hanover, 36 N. H. 422
Saunders v. Bluefield Water Works Co., 58 Fed. Rep. 138
1 Lewis on Em. Dom. 588
13 Am. & Eng. Enc. of Law (2nd ed.), p. 858, Par. 7
N. Y. & Erie Ry. Co. v. Young, 33 Penn. St., p. 180

Even if sec. 1024 of the Missouri foreign corporation law can be construed to grant a right to condemn, this Bridge Company would still be without such power, for the reason that under this very statute it can have "no other or greater powers" than "corporations of like character organized under the general laws of this State".

Plaintiff claims to be a corporation of the same character as corporations organized under sections 1351, 1352 and 1353, Vol. 1, R. S. Mo. 1899; but the terms of these sections do not include railway bridges ACROSS the Mississippi River. The history of these sections shows the intention of the Missouri Legislature to exclude railway bridge corporations from organizing thereunder, and from the power to condemn therein provided for.

Under the present Constitution of Missouri, adopted in 1875, sec. 53, Art. IV, bridges across navigable streams forming boundary lines of this State may be built under *special legislation*. In the revision of 1879 the above-mentioned sections 1351, 1352 and 1353 (originally sections 16, 17, 18 and 19 of an Act approved

March 19th, 1866, entitled "Manufacturing and Business Companies") were reduced to their present form. By this revision the clause in the original act referring to *railroad bridges was cut out*. The law was left as it now stands, authorizing the construction of bridges "over the streams of water or any part of such streams which may be within this State for public use *for the crossing of persons and property*, and the condemnation of property for "approaches, *road*, *foot or wagon ways*" for such bridge.

Our purpose in re-asserting our contention that the plaintiff has no power of Eminent Domain in Missouri is because of the bearing which we believe the Federal law applicable to the construction of bridges (already quoted) has upon the powers which plaintiff has a right to exercise in Missouri, now.

III

Defendant in error is estopped from claiming a more extensive area of the western approach to the bridge than that defined by the design and plan approved by the Secretary of War.

The Bridge Company was granted by the Act of Congress the **essential and needful** Federal authority to build this **"bridge and approaches thereto"** over the Mississippi river (to quote section 1 of the Act). It was by the Act required to define its wants by "a design and drawings of the bridge, piers, **approaches** and accessory works", which design and drawings became the *warrant* (and, we say, also the **limitations)** of authority to construct the "bridge, approaches and accessory works".

When the Federal consent or authority was thus obtained, on certain terms, the defendant in error is estopped from asserting a greater scope of authority than it thus obtained.

It took the benefit of the Act and of the plans and drawings thereunder, for the purpose of **constructing** the bridge and approaches; it should justly bear likewise such **burden** as the terms of the grant may import.

Broom Max. 705–712

The burden is merely to remain within the terms of the authority it sought and obtained. There is no injustice in requiring this. To do otherwise would be to allow the defendant in error to get beyond and above the terms of the Federal Act which defined the conditions without the observance of which (to quote the Act again) **"it shall not be lawful to construct,** or commence the construction of any **bridge"**, etc., over any **"navigable river"** in the United States.

30 U. S. Stat. L., p. 1151, sec. 9

The terms of the Act just cited disclose clearly that the object of the legislation was to forbid the erection of such bridge-works (over navigable waters) as are here in question, even **"wholly within the limits of a single State", without previous Federal** sanction, for the section declares:

> "*Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which **lie wholly within the limits of a single State,** provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before con-

struction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, **it shall not be lawful to deviate from such plans either before or after completion of the structure** unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

(30 Stat. L., 1151, sec. 9)

The last proviso demonstrates that no **bridge-approach** is lawful, **outside that** sanctioned by the Federal approved maps, because such outside works (as accessory or appurtenant to the bridge) would be necessarily a deviation **"from such plans"**. "It shall not be lawful to deviate from such plans EITHER BEFORE **or after completion** of the structure", unless with *previous* Federal approval.

Our contention is that this Act is a **bar to the enlargement** of the area of the bridge approach, as approved by the map and limited to a distance of 720 feet from the river bank. What notice or weight was accorded to our contention on this subject, in the previous history of the case, your Honors may, perhaps, discover, but you will then be more fortunate than we.

IV

The petition of the Bridge Company (on which the whole case rests) **does not state facts to warrant the taking of the land** in question as a bridge approach, **under the governing Federal Statutes.**

The petition of defendant in error does not state a cause of action for condemnation, because, in the first

place, **it fails to show compliance with the Federal laws** authorizing the construction of said bridge.

The Federal Act, of which all Courts take judicial notice, as the supreme law of the land, prescribes a number of preliminary steps essential to the construction of the bridge. The petition should show compliance with every essential condition, which it fails to do, for instance, with the absolutely vital condition that **the bridge construction be begun within one year.** There is no such allegation, and the proof is exactly to the contrary (Printed Record, p. 23).

In the learned opinion of the majority of the Supreme Court of Missouri, it is said, in treating this point of objection, that **"the presumption will be indulged** that it" (the bridge) **"was completed within the time specified"** (194 Mo. 189).

In this connection it may be appropriate to quote the words of Judge WALLACE of New York in regard to this subject in Pennsylvania Ry. Co. v. Baltimore & N. Y. Ry. Co., 37 Fed. 130:

> "The demurrer thus raises the question of the burden of proof in a case where the navigation of public waters has been obstructed under circumstances that constitute a nuisance, unless those concerned are authorized by competent authority to maintain the obstruction in the manner **and to the extent** in which it exists. I have no hesitation in deciding that those who obstruct the use of a public highway, whether on land or water, must justify the act by producing their authority, and proving that they exercised it **in essential conformity to its terms.** Their act is an encroachment upon the rights common to all, unless they have a peculiar privilege which exempts them from the general rule of obligation. The fact that a bridge over navigable waters has been sanctioned by Congress,

> or by the State within whose limits they are situated, and that it has been built by the person or corporation authorized to build it, does not render it a legal structure, **unless as built it conforms to the terms and limitations of the authority.**"

We invoke the principle of the above ruling to support our contention that no right to condemn is shown by the petition or by the facts outside the petition.

The petition does not state a cause of action because the purposes for which the land is claimed by the petition are, at least in part, beyond the objects for which land may be condemned by a bridge company proceeding under the authority of the Federal Act authorizing this bridge, namely, in part **"for terminal yards"**. Such a purpose is not within the terms of the law permitting the taking of land by a bridge company of the sort in question here but, on the contrary, the Act of Congress authorizes **only such "bridge * * * approaches and accessory works"** as are included in the plats, designs and drawings, approved by the Secretary of War; and no such "trimmings" appear on those documents in this case.

The petition does not state a cause of action, because it alleges that the **bridge is being constructed "within the territorial limits"** set out in the Act of Congress. The Act of Congress sets out no limits, expressly, but defines a method by which the limits were established, namely, **by a map approved finally by the Secretary of War.** Plaintiff alleges **none** of those specific steps, nor the territorial limitations fixed by said map, and hence the petition is deficient on its face.

N. Y. Central case, 5 Hun. 86
Railroad v. Railroad, 37 Fed. 129
Miller v. N. Y., 109 U. S. 385

The petition is also deficient in that it shows upon its face that other purposes besides those for which land may be taken for bridge purposes are contemplated by the taking of the land in question. The petition alleges, among other things, that the property of defendants is necessary for **"terminal yards"**. If defendant in error had the right to appropriate a reasonable amount of land for a bridge approach, it does not thereby acquire the right to appropriate land (under the federal Act act authorizing the bridge) for **"terminal yards"**. The evidence before the Court shows that the so-called "terminal yards" extend at least **two and one-half miles west of the river bank.** Those limits are certainly not essential for a bridge approach. The petition confesses that fact by declaring that the "terminal yards" are as much an object of the appropriation of the land as the bridge approach itself. On this branch of the case we respectfully submit that it affirmatively appears from the petition that the land is sought to be condemned **for a purpose to which the federal law** (which alone furnishes authority for any bridge construction at this place) **gives no sanction.** The fact that other parts of the petition allege purposes which might be more debatable does not improve the status of defendant in error. The one unauthorized purpose vitiates the entire claim to appropriate the land desired. It is a settled rule of this subject that where land is sought to be condemned for two purposes, one of which is authorized and the other not authorized by the law of Eminent Domain, **the whole proceeding must fail.**

Lake Shore, Etc., Co. v. B. & O. Co., 142 Ill. 272

The petition omits any averment that the real property is sought to be taken "*for public use*". That averment **is essential** to support any taking of property, as there would be no **"due process of law"**, if taken for private use. The averment of a proposed and legitimate **public use** is essential and jurisdictional.

Railroad v. Nebraska, 164 U. S. 403
N. Y. Cent. case, 5 Hun 86
Colville v. Judy, 73 Mo. 651
Railroad v. Galt, 133 Ill. 657
Evergreen Assn. v. Beecher, 53 Conn. 551

Conclusion

We believe that the pivotal rule on which the case should turn is that express legislation of Congress, defining terms on which bridges over navigable interstate rivers may be **constructed,** ALTERED or ABOLISHED, if need be, is **exclusive** (strictly so) of any legislative power in the several States to treat that subject.

The precept that laws conferring powers to take private property for public use are to be construed strictly or narrowly, is familiar and well settled.

10 Ency. Law (2d ed.) p. 1100

But we need not invoke an application of that precept because, in the case at bar, there is a total **want of power** to take this land as part of a bridge approach, because **there is no bridge approach** beyond the 720 feet marked as such by the Federal authority, in as much as that authority alone has the power to authorize the construction thereof as part of a bridge over the Mississippi River.

THE PROPER STEPS to start and to preserve for review the Federal questions outlined above were duly taken from the very beginning of the case, conforming to the principles announced in many decisions of this Court.

McCormick v. Bank, 165 U. S. 538
Bank v. Kennedy, 167 U. S. 362
Nutt v. Knut, 200 U. S. 13
Lavagnino v. Uhlig, 198 U. S. 443
Otis Co. v. Ludlow Co., 201 U. S. 141
Vicksburg v. Waterworks Co., 202 U. S. 453

A Federal question is involved, even although the State Court rested its decision on the Constitution and laws of the State.

Kies v. Lowrey, 199 U. S. 233

The first judgment in the Supreme Court of Missouri in this cause (174 Mo. 1) was one of reversal and remand, from which judgment, of course, no writ of error from this Court would lie.

Johnson v. Keith, 117 U. S. 199
Schlosser v. Hemphill, 198 U. S. 173

ON THE SECOND APPEAL (194 Mo. 175) proper foundations for discussing the questions here presented were laid by the assignments of error in the Supreme Court, which appear in full in the Printed Transcript (pp. 183–185).

There is a hint in the learned opinion of the majority of the Supreme Court of Missouri that *some equities* have arisen to strengthen the present position of the Bridge Company, because there has been **"expended a vast amount of money** in the construction of said bridge

and approaches" (194 Mo. 189), and it is said that if the State decisions were overruled, it **"could but result in great injury to plaintiff and other investors,** who acted on the faith" thereof.

There is nothing in this record to show that any impairment of value of any investments made on the faith of the bridge would ensue by limiting the approach to the bounds **defined by the Bridge Company's own map,** approved by the Secretary of War. The only consequences which would follow if the Bridge Company should be restricted to the limits it marked for itself (and the Federal government approved) would be that other modes of taking the property in question for public use as a railway terminal would become necessary.

The case at bar has been pending for several years, since April, 1902, but in the early stages thereof the present plaintiffs in error interposed the chief objections urged to the condemnation of this land, in exceptions (filed in April, 1903) to the report of the commissioners for condemnation, **before the trial of the cause,** in most distinct and unmistakable terms, and again, after the trial, the objections were renewed in the motion for new trial (Printed Record, pp. 178–180).

At every stage of the litigitaion, plaintiffs in error have insisted on an observance by the Bridge Company of **the limitations and conditions** imposed upon it by the Act of Congress which gave it the authority to build this structure.

We respectfully pray this Conrt to inforce the **just and clear terms** of the Federal statute, which is the whole warrant of the power given to the defendant in error, and **to keep defendant in error within its plain terms.**

We humbly ask that the judgment of the Supreme Court of Missouri be reversed and the cause be remanded with appropriate directions.

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St. Louis, Mo.,
February, 1907.